# In the Supreme Court of the United States

OCTOBER TERM, 1971

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No. 71-100

SIDNEY GLASSER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a), is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on May 21, 1971. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to July 20, 1971, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the admission of various items of evidence was reversible error.

## STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiracy to affect interstate commerce by extortion in violation of 18 U.S.C. 371, and two substantive counts in violation of 18 U.S.C. 1951. He was sentenced to concurrent terms of five years' imprisonment on each count and was fined a total of $20,000, $10,000 on the conspiracy count and $10,000 on one of the substantive counts. The prison sentence was suspended and petitioner was placed on probation for two years. The court of appeals in a comprehensive opinion affirmed the conspiracy count, but reversed the two substantive counts.[1]

Petitioner was the business manager and chief operating officer of Glazier's Union Local 1087 in New York, the only union in the New York metropolitan area representing plate glass installers.

Periodically the Glazier's Union sent insurance companies a list of approved union shops with the

[1] Petitioner's co-defendant Kaplan was acquitted on all counts; co-defendant Larry Hill was convicted on all three counts. Hill filed an appeal which was subsequently withdrawn.

request that only listed companies be used for plate glass installation. Petitioner sent out the list in 1968 and 1969. Among the union shops the list showed, as if they were separate companies, four company names under which petitioner's brother, Arthur, operated (R. 233, 287-289, 290-291).

During the period from 1962 through 1968 many shopowners who had plate glass installed by non-union glaziers found the glass permanently smeared with acid and rendered unusable a few days after installation. In each case, the ruined glass was then replaced by union glaziers hired by the insurance companies (R. 90-93, 105-129, 141-149, 208-211, 284-286). One non-union glazier had about 30 plate glass installation jobs treated with acid from mid 1966 through 1968. He also had one job ruined by the glass being cut with X's. (R. 146-148).

One shopowner testified that he had received a telephone call in June, 1967, from someone at a unionized glass company telling him that, if non-union glaziers were used in replacing a plate glass window, he would have trouble. The glass was installed by the non-union company, and it was destroyed by acid the next day (R. 98-107). It was subsequently replaced by a unionized glass company.

Another shopowner testified that his plate glass window, installed by a non-union glazier, was destroyed by acid in July, 1967. He found a note slipped under his shop door telling him to be sure that the glass was replaced by a unionized glass company. The glass subsequently was replaced by union glaziers (R. 126-129).

One non-union glazier testified that he was informed in 1963 or 1964 by the owner of a shop where he had just completed a plate glass installation that a union glazier had told the shopowner the job would be "acided" because it was non-union. The witness testified that he promptly called petitioner at the union headquarters and angrily reported what he had been told. He threatened petitioner that, if the job were "acided," he, would personally come down and pour acid on petitioner.

Petitioner subsequently called him back and said not to worry; that nothing would happen to the glass. Nothing did happen (R. 464-467).

Another non-union glazier was working on a job after hours in 1962 when he was approached by a man who asked to see his union permit to work after hours. He told the man that he did not need a permit because he was non-union. The next day the newly installed glass had acid thrown on it (R. 202-211).

The key government witness at the trial was Sheppard Gellert, who was a former assistant financial secretary of the Glaziers Union Local 1087 and former administrator of the pension and welfare fund (R. 214-216). Gellert testified that at monthly union meetings from 1960 through 1964, petitioner had told the union members that they were to report to the union any non-union glazier work they observed.[2] In early 1963 Gellert was told by co-defendant Kap-

[2] This was required by the union by-laws and failure so to report could result in a fine.

lan that he checked the non-union jobs reported, and then turned them over to Glasser for "aciding" (R. 222-225).

Gellert had seen acid delivered to Glasser at the union headquarters in late 1962 or early 1963 and again in 1964. It was kept in the basement (R. 227-228). In 1964, Gellert saw Hill with acid and was told by Hill that he had to "do a job" for Glasser (R. 230-231). In the summer of 1965, Gellert overheard petitioner yelling at co-conspirator Hill over the telephone. Gellert told petitioner that Hill was too unstable to be doing "aciding," but petitioner said it was O.K. because he could handle Hill (R. 232).

In early 1965, Gellert overheard petitioner and Kaplan in the union office discussing a newspaper article concerning an investigation by the district attorney of a Westchester County "aciding." Petitioner told Kaplan and then Gellert that "we didn't do it." Kaplan told Gellert that petitioner was very upset even though it was not one of their jobs, "because it put the heat on" (R. 234-236). During 1965 Gellert overheard many conversations between petitioner and Kaplan about "acidings." On one occasion, discussing a union job that had been acided petitioner remarked that "that will teach him a lesson" (R. 236-238). Gellert also testified that in 1965 he had "acided" a window on a non-union job himself with acid obtained from the union basement (R. 226-227).

Gellert made his initial disclosures about the "aciding" secretly to a Compliance Officer of the Labor Department in October, 1965. He told the officer that

petitioner had people throw acid on windows on non-union jobs and that co-conspirator Hill was one of the people used (R. 422-430).

## ARGUMENT

The court of appeals found several errors in the trial but ruled that, in light of the substantial if not "overwhelming evidence" against the defendant (Pet. App. 7a) they were harmless under the standard of *Chapman* v. *California*, 386 U.S. 18, 24. In light of the evidence summarized in the statement, *supra*, this was clearly correct.

1. On redirect examination, Gellert testified that co-conspirator Hill, at a party which occurred during the life of the conspiracy, made a statement (see Pet. App. 6a) that he did "aciding" for petitioner and that petitioner did not appreciate it. The court below found that this was not a ground for reversal since the answer was unexpected; petitioner's counsel objected only on the ground that the question was "not proper redirect," and that in any event, the error, if any, was harmless. In addition to these factors, it should be noted that the statement was admissible against Hill and that there was other evidence that Hill acted with petitioner.

2. Several defense witnesses at trial were close union associates of petitioner. They had been called before the grand jury investigating the acid throwing, and, on the advice of their attorneys, had refused to answer any questions, invoking the protection of the Fifth Amendment. These witnesses testified at trial to the bias of the witness Gellert. In

cross-examining them, the government attorney asked each if he had heard of "aciding." Receiving an affirmative reply in each case, he then asked if they had given the same answer before the grand jury and each man answered that he had refused to testify, or had invoked the Fifth Amendment. The court of appeals found that while this line of cross-examination was error, it was harmless.

Unlike *Grunewald* v. *United States*, 353 U.S. 391, this was not a case where a prior invocation of the Fifth Amendment by the defendant himself was shown. The direct testimony of these witnesses was merely cumulative on the bias of the witness Gellert, which was conceded by the government. The danger that the jury might equate the prior Fifth Amendment plea of these witnesses with *petitioner's* guilt was thus minimal. *United States* v. *Sing Kee*, 250 F.2d 236, 239-241 (C.A. 2), certiorari denied, 355 U.S. 954. Any possibility of such influence on the jury was, as the court of appeals pointed out, dispelled by the clear instructions given by the trial judge both at the time (R. 762-763), and in the charge to the jury (R. 1436-1437).

3. After petitioner testified on direct examination that he "did not conspire with any man to spray acid on any job at any time," he was cross-examined by the government attorney about an acid incident in 1960. The trial judge had ruled before trial that direct evidence of this incident could not be introduced on the government's case in chief because it was too remote in time from the conspiracy charged and too prejudicial. After petitioner denied com-

plicity in this incident on cross-examination, however, the government was permitted to introduce evidence on rebuttal through the testimony of a witness, Propper, showing that petitioner had, in fact, ordered the throwing of acid in that case (R. 1111-1114).

The court of appeals held that this was improper rebuttal evidence, because prior criminal acts not resulting in conviction may not be made the subject of direct proof for impeachment purposes. That court also found, however, that it would not have been error for the trial judge to have allowed this evidence on the government's case in chief as proof of a prior instance of a virtually identical and highly unusual crime, rather than merely showing a general proclivity to crime. Since the only error was in the order of admission, no prejudice can be shown.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1971.

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